

Teague v Senno-James
2014 NY Slip Op 33078(U)
July 15, 2014
Supreme Court, Putnam County
Docket Number: 1319/11
Judge: Lewis J. Lubell
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TRC 8/18/14 @ 9:30 AM

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

**SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM**

-----X
NANCY TEAGUE,

Plaintiff,

-against -

NANCY J. SENNO-JAMES and INTEGRITY HOME INSPECTION COMPANY, JOHN PETRILLO and CENTURY 21 VJF REALTY, INC.,

Defendants.

-----X
JOHN PETRILLO and CENTURY 21 VJF REALTY, INC.,

Third_Party Plaintiffs,

-against -

JOAN REINHARDT, Individually and COLDWELL BANKER FOWKES REALTY INC., FOWKES REALTY INC.,

Third Party Defendants.

-----X
LUBELL, J.

DECISION & ORDER

Index No. 1319/11

Sequence No. 5-7

Motion Date: 4/28/14

Index No. 1319/11

The following papers were considered in connection with the the respective summary judgment motions by defendant Nancy J. Senno-James (**Motion Sequence #5**), defendants John Petrillo and Century 21, VJF of Brewster, Inc. s/h/a Century 21 VJF Realty, Inc. (**Motion Sequence #6**), and Integrity Home Inspection Company and Joseph Salvati, individually (**Motion Sequence #7**):

PAPERS

NOTICE OF MOTION/AFFIRMATION/EXHIBITS A-D

NUMBERED

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Plaintiff/purchaser, Nancy Teague, ("Purchaser") brings this action sounding in negligence, "detrimental reliance" and breach of contract against defendant Integrity Home Inspection Company ("Integrity"), fraudulent misrepresentation against defendant/seller Nancy J. Senno-James (the "Seller"), and "failure to disclose material defects" one each against the listing real estate agent John Petrillo ("Petrillo") and his employer, defendant Century 21 VJF Realty, Inc. ("Century 21"), in connection with her purchase of the residential premises known as 23 Birch drive, Brewster, New York, 10509.

Defendants now move for summary judgment in their favor.

Motion by Seller - Nancy J. Senno-James

Seller moves for summary judgment relying on the "as is" clause (paragraph "17") of the underlying contract of sale, the "merger doctrine" (paragraphs "28" and "32"), and the additional provisions of paragraph "32" wherein Purchaser represents that she has not relied upon the Property Condition Disclosure Statement annexed to the contract of sale and that, except as noted in the contract, no representations, warranties or guarantees were made to her.

New York adheres to the doctrine of caveat emptor and imposes no duty on the seller or the seller's agent to disclose any information concerning the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller or the seller's agent which constitutes active concealment (see Platzman v. Morris, 283 AD2d 561, 562 [2001]; Glazer v. LoPreste, 278 AD2d 198 [2000]; London v. Courduff, 141 AD2d 803, 804 [1988]). "If however, some conduct (i.e., more

than mere silence) on the part of the seller rises to the level of 'active concealment' (Slavin v. Hamm, 210 AD2d 831, 832; see, Stambovsky v. Ackley, 169 AD2d 254, 257), a seller may have a duty to disclose information concerning the property" (Bethka v. Jensen, 250 AD2d 887, 888 [1998]). To maintain a cause of action to recover damages for active concealment, the plaintiff must show, in effect, that the seller or the seller's agents thwarted the plaintiff's efforts to fulfill his responsibilities fixed by the doctrine of caveat emptor (see Platzman v. Morris, supra at 562).

(Jablonski v. Rapalje, 14 AD3d 484, 485-86 [2d Dept 2005]).

Even when assuming that Seller has met her initial burden of establishing entitlement to judgment in her favor as a matter of law (despite the lack of her own affidavit in support or the submission of her own deposition testimony), the Court finds that Purchaser has raised material questions of fact regarding, among other things, the issue of active concealment.

The Court finds unpersuasive Seller's reliance on that portion of paragraph "32" of the contract of sale (see supra) which effectively seeks to nullify the underlying purpose and public policy sought to be effectuated through section 462 of the Real Property Law. Such an undeveloped and unsupported position is rejected. "A false representation in a disclosure statement has been held to constitute active concealment" (Anderson v. Meador, 56 AD3d 1030, 1035 [3d Dept 2008] citing Simone v. Homecheck Real Estate Servs., Inc., 42 AD3d 518, 520-521 [2007], Rector v. Calamus Group, Inc., 17 AD3d 960, 961 [2005]), and the Court is not persuaded by Seller's curt arguments that paragraph "32" can defeat Purchaser's right to pursue such an agenda.

Motion by Integrity Home Inspection Company¹

The Court finds that Integrity has come forward in the first instance with an adequate showing of its entitlement to judgment in its favor as a matter of law. Among other things, through the

¹ Integrity's informal application made in paragraph "4" of counsel's affirmation in support dated March 24, 2014, for the Court to "treat this motion for summary judgment as being made in [a "related" action under Index number 246/2013] is denied, without prejudice to whatever proper and timely relief Integrity may wish to pursue in that action.

affidavit of Joseph Salvati, Integrity presents an analysis and adequately supported defense to the various allegations advanced against it by plaintiff such as would warrant dismissal of the action.

In response, however, Purchaser has come forward with an adequate showing that there are material issues of fact precluding summary judgment in favor of Integrity including, but not limited to, whether there were additional and readily accessible and visible defects that should have been observed by Integrity and reported to Purchaser.

Motion by Petrillo and Century 21

The Court grants the motion for summary judgment made by Seller's listing real estate agent, Petrillo, and Seller's real estate agency, Century 21.

"It is well settled that a real estate broker is a fiduciary with a duty of loyalty and an obligation to act in the best interests of the principal" (Cornwell v. NRT New York LLC, 95 AD3d 637 [1st Dept 2012], citing Dubbs v. Stribling & Assoc., 96 NY2d 337, 340 [2001]), here the Seller. In that regard, Petrillo and Century 21 have come forward with sufficient proof in admissible form establishing their entitlement to judgment in their favor as a matter of law on Purchaser's claimed "failure to disclose" causes of action against them. Among other things, Sellers have established that no duty of disclosure exists in Purchaser's favor.

Purchaser's claimed material questions of fact, however, are based upon hearsay (a meeting with prospective buyers who "told me"), speculation and conjecture as to, among other things, claimed defects that Petrillo should have observed and reported to her, but which neither Purchaser nor Integrity observed. Purchaser also advances speculative questions of fact such as whether Petrillo helped fill out the Real Property Condition Disclosure based upon her assertion that it is "not unusual for a seller's agent to assist in [its] preparation."

Based upon the foregoing, it is hereby

ORDERED, that the motions for summary judgment by Nancy J. Senno-James, and Integrity Home Inspection Company and hereby denied; and, it is further

ORDERED, that the motion for summary judgment by Petrillo and Century 21 is hereby granted.

All remaining parties are directed to appear before the Court for a Trial Readiness Conference at 9:30 AM on August 18, 2014.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
July 15, 2014

S/

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